IN THE

Supreme Court of the United States

October Term, 1951
No. 723

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY, INC.,

Petitioners,

vs.

HARWOOD A. WHITE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.
Preliminary Statement.

A cursory appraisal of Petitioner's Petition for a Writ of Certiorari and Brief in Support Thereof demonstrates that this cause falls far short of meeting the requirements of subdivision 5 of Rule 38 of the Supreme Court. Economically the matter is of small importance and in respect to the law there is no dispute whatever, the Court of Appeals adopted the Trial Court's opinion relating to the law of limited publication [R. p. 241]. The evidence is not in conflict [R. p. 238] and the sole question presented on this appeal is whether or not the evidence sup-

ports findings and judgment to the effect that there has not been a general publication of the Old Gaelic manuscript by the author prior to the claim of copyright by Petitioner made after the author's death. The Trial Court felt that such findings and judgment were supported, the Appellate Court felt that they were not. Such a dispute hardly falls within either the letter or intent of Section 5 of Rule 38.

II.
Facts.

The Findings of Fact filed by the Trial Court [R. pp. 40 *et seq.*] recite little factual matter and are largely made up of conclusions.

The opinion of the Trial Court is divided into two parts: (1) a brief summary of the law [R. pp. 19 to 24] with which no one quarrels, (2) an attempt to fit the law to the evidence which goes far afield and with which both Appellant and the Appellate Court sharply disagreed. The point of disagreement is not whether or not the manuscript was published in the manner contended by the author and by others with his consent, but rather is confined to the single question of whether or not there were any limitations placed by the author on the purposes for which it was published or on the persons to whom it was admittedly published. The Appellate Court very fairly summarizes the factual situation in its opinion [R. pp. 236 *et seq.*]. We will not burden this brief with an elaborate statement of facts. Suffice it to say that Peti-

tioner claims the only limitation on the publication was that it was to "friends" or to "persons particularly interested in the subject matter." Petitioner does not claim that the term "friends" means friends of the author and by the author's declarations in evidence, the term includes friends of his friends [R. p. 238], it also includes friends of an indefinite group of people in Palo Alto [R. p. 239, footnote 2]. Both sides disclaim that there was any organized group to which distribution was limited and the only qualification necessary to constitute one "particularly interested in the subject matter" was sufficient interest to request a copy. Incidentally the subject matter is a general philosophy of living. The work is not technical and its circulation without claim of copyright continued for more than thirteen years. Respondent has never suggested any purpose connected with the circulation of the work and none is discernible from the record except a desire to have people read it.

III.
The Law.

Appellant, Respondent herein, adopts, as did the Appellate Court, the summary of the law expounded by the Trial Court [R. pp. 19 *et seq.*].

IV.
Argument.

The vociferous protestations of Petitioner, notwithstanding the Appellate Court did not violate Rule 52A, it merely applied the fundamental, familiar and ancient rule that a judgment must be supported by the evidence. No conflict whatever exists in respect to the existence of the rule or the duty of the Appellate Court to apply it. No conflicts in the application of the rule appears in the Petition or the brief in support thereof. The unimpeached and uncontradicted evidence in this cause showed that between two and three hundred bound copies of "Old Gaelic" had been made and distributed by sale and by gift to members of the general public without limitation on who might receive a copy, without limitation on the use the recipient might make of the copies and without purpose other than to publish. The Appellate Court felt constrained to hold that there had been a general publication and a gift of the manuscript to the public. The case is not only of no general importance but patently has been correctly decided.

Wherefore, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FRED H. SCHAUER,
Attorney for Respondent.

SCHAUER, RYON & MCMAHON,
THOMAS M. MULLEN,
ROBERT W. MCINTYRE,
Of Counsel.